

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LONI GIETZEN-HERRMANN

Claimant

VS.

EXCEL CORPORATION

Respondent

Self-Insured

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Docket No.189,389

ORDER

The application of respondent for review by the Workers Compensation Appeals Board of Award entered by Administrative Law Judge Jon L. Frobish on March 7, 1996, came up for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, David H. Farris of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, D. Shane Bangerter of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What, if any, is the nature and extent of claimant's injury or disability? It is noted that the parties have stipulated to a 7 percent whole bodily functional impairment, as a result of the injuries suffered by claimant to her shoulders and upper extremities. The issue before the Appeals Board is claimant's entitlement to additional work disability above the 7 percent functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant began her employment with respondent on July 20, 1988, and continued through September 10, 1993, as a machine operator. This job required claimant pull bagged meat off of a belt and place either into a machine or into a combo box. The physical requirements of this job included turning, twisting, pushing and pulling, bending and stooping with weights up to 100 pounds. Claimant experienced overuse syndrome including bilateral bicipital tendinitis of the elbow with an injury date of May 4, 1993. Claimant was taken off work on September 10, 1993, as a result of an injury suffered to her low back in Docket No. 186,832 a companion case in this matter. Claimant attempted to return to work but was placed back on the same job and developed additional symptoms which again forced her to leave work. She was taken off work by her then treating physician Dr. Randy Schmidt, a chiropractor. Claimant remained on temporary total disability compensation as a result of the injury suffered to her back in the companion case 186,832 for slightly over one year.

On September 29, 1994, respondent's workers compensation coordinator, Ms. Susan Stephens, sent claimant a letter indicating respondent was ready to accommodate the restrictions placed upon claimant by Dr. Brown. This written offer was not received by claimant until approximately October 10, 1994, which was the date claimant was instructed to return to work. At this time, claimant was undergoing physical therapy work hardening for her back and was unable to return to work for respondent. A subsequent letter dated October 14, 1994, was sent to claimant offering accommodation in the laundry room. This letter also offered to accommodate the hours of physical therapy attended by claimant. In Ms. Stephens' deposition, the back restrictions of Dr. Brown were discussed as well as the upper extremity restrictions of Dr. J. Mark Melhorn. Ms. Stephens felt the job offered to claimant was within the restrictions place upon claimant by both Dr. Brown and Dr. Melhorn.

Respondent objects to claimant's entitlement to work disability above the 7 percent stipulated functional impairment based upon claimant's refusal to accept accommodated employment. See Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), as support for its position. Claimant counters alleging that the offer of accommodation by respondent was based upon temporary restrictions placed upon claimant by Dr. Brown only. Ms. Stephens, in her deposition, indicated that while the offer was based upon temporary restrictions, upon receipt of permanent restrictions a walk through of the plant would be offered to claimant at which time she could choose any job that she felt was within her physical abilities to perform. Claimant refused the first accommodated offer citing the fact that she was in physical therapy in Great Bend, Kansas, and that it would be impossible to work in Dodge City, Kansas, as well. However, no medical records in evidence indicate claimant attended physical therapy or work hardening after October 12, 1994. Claimant also sent a letter to Ms. Stephens dated October 12, 1994,

refusing the accommodated offer of employment citing the fact that she was pregnant and that working for Excel due to the stress related environment would further aggravate her symptoms. Claimant did not attempt to return to work at respondent's facility.

The Court of Appeals in Foulk v. Colonial Terrace, *Supra*, denied the claimant work disability after an offer of accommodated employment was refused. The Court of Appeals justified the denial of a work disability under that circumstance stating:

"The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."
Id at 284.

In this instance, claimant has been offered accommodated employment within the restrictions placed upon her by Dr. Brown and Dr. J. Mark Melhorn. Claimant has refused this accommodated employment. The Appeals Board finds that claimant's refusal violates the mandates of the Court of Appeals in Foulk, *Supra*, and work disability should be and is hereby denied. As such, claimant is limited to her stipulated functional impairment of 7 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 7, 1996, should be, and is hereby, modified and the claimant, Loni Gietzen-Herrmann, is granted an award against respondent, Excel Corporation a qualified self-insured, for an injury occurring through May 4, 1993, for a 7 percent permanent partial disability to the body as a whole.

Claimant is entitled to 11.21 weeks temporary total disability compensation tendencies converted from temporary partial disability compensation in the sum of \$3,026.34 followed by 403.79 weeks permanent partial disability compensation at the rate of \$18.90 per week totaling \$7,631.63 for a total award of \$10,657.97.

As of April 1, 1997, there would be due and owing to claimant 11.21 weeks temporary total disability compensation as converted from temporary partial in the sum of \$3,026.34, followed by 192.79 weeks permanent partial disability compensation at the rate \$18.90 per week totaling \$3,643.73 for a total due and owing of \$6,670.07 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 211 weeks permanent partial disability compensation at the rate of \$18.90 per week in the amount of \$3,987.90 until fully paid or until further order of the Director. Additional findings by the

Administrative Law Judge in the Award of March 7, 1996, but not appealed to the Appeals Board are affirmed in so far as they do not contradict the opinions expressed herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Susan Maier	
Transcript of Preliminary Hearing	\$181.48
Transcript of Regular Hearing	\$127.06
Underwood & Shane	
Deposition of C. Reiff Brown, M.D.	\$174.00
Deposition of Lois Cephus	\$362.00
Deposition of Susan Stephens	\$239.50
Kelly York & Associates, Ltd.	
Deposition of Lawrence Blaty, M.D.	\$422.00
Deposition of Jerry Hardin	\$450.85
Barber & Associates	
Deposition of J. Mark Melhorn, M.D.	\$156.20
Bannon & Associates	
Deposition of Loni Gietzen-Herrmann	\$388.40

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Jerry Moran, Hays, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director